Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1458

MORGAN GUARANTY TRUST COMPANY OF NEW YORK,

Petitioner,

v.

ALTON RINIER, as Agent for Certain Employees of Bankrupt; ANSWERING EMPLOYEES OF BANKRUPT; LOCAL 807-IBT; RETAIL CLERKS INTERNATIONAL ASSOCIATION; and NATIONAL LABOR RELATIONS BOARD,

Respondents.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The National Labor Relations Board ("NLRB") has filed a brief opposing certiorari in this case. Unlike the other respondents, the NLRB agrees that a conflict exists among the Circuits on the treatment of severance pay claims in proceedings under the Bankruptcy Act and also agrees that the existence of that conflict is acknowledged by the Court below. But the NLRB opposes the petitions of the Grant Trustee and of Morgan Guaranty on the ground that the conflict is not one of general importance in light of the enactment of the new Bankruptcy Code.

The position of the NLRB is untenable. The conflicting interpretations among the Circuits, as to whether severance pay accrues over a period of time or all at the moment of termination, survive under the new Code because the differing rationales of the Circuits are of pre-

cisely the same applicability to the concept of administration expenses under the new Code as under the old Act.

Thus, if the First and Third Circuit's understanding of severance pay is correct, that it is a form of wages earned over time, then allocation will continue to be the rule in those Circuits under the new Code. If the Second Circuit's view is correct, that severance pay is in the nature of damages and is earned as compensation for termination (with only the amount varying according to length of service), then in Second Circuit cases under the new Code severance pay will always be an administration expense for any employee let go after a bankruptcy filing.

The NLRB tries to minimize the conflict by contending that the new wage priority provisions provide "a significantly changed statutory context" (NLRB Br. at 7). In fact, there is no substantive change in the statutory approach (*compare* Act §§ 64a(1) and (2) with Code §§ 503(b) and 507(a)(1) and (3)), and the legislative history of the Code shows that Congress contemplated no change other than increasing the amount of the pre-filing wage priority from $600 to $2,000 (*see* 10 Resnick and Wypyski, Bankruptcy Reform Act of 1978—A Legislative History (1979) at 297; House Rep. No. 95-595 in 5 U.S. Code Cong. & Ad. News (1978) at 6313).

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May 20, 1980

Respectfully submitted,

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